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IN THE

Supreme Court of the United States

October Term, 1959

No. 742

TRI-CONTINENTAL FINANCIAL CORPORATION,
Petitioner,

—v.—

HELENE GLENMORE, CELIA SCHREIBER, DOROTHY HENESSY, MARTIN KOLBRENER, ISADORE BLAU,
and
THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
Respondents.

Misc. No. 813

TRI-CONTINENTAL FINANCIAL CORPORATION,
Petitioner,

—v.—

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT,
Respondent.

BRIEF OF RESPONDENTS-STOCKHOLDERS IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI OR MANDAMUS

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BRIEF OF RESPONDENTS-STOCKHOLDERS IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI OR MANDAMUS

Respondents, who were plaintiffs-appellants below, are stockholders of defendant-respondent New York, New Haven & Hartford Railroad Company ("New Haven"). They submit this brief in opposition to the petitions of Tri-Continental Financial Corporation ("petitioner"), defen-

dant-appellee below, for a writ of certiorari or a writ of mandamus.

Statement of the Case

For purposes of these petitions, we accept the factual portions of petitioner's statement of the case, except for the following omissions:

1. The District Court's decision, which disposed jointly of the motions in the Government's case (No. 741) and in ours, held:

> "All parties agree and I independently find that no genuine issue as to any material fact is raised on any of the motions. Decision of each turns solely on the following question of law: whether [the put agreement] is illegal and void because it lacks prior authorization by the Commission pursuant to Section 20a of the Interstate Commerce Act." (Pet. A-2).

2. The facts and evidence bearing on that single dispositive question of law were necessarily the same in the Government's case and in ours.

3. The complete facts and evidence bearing on that question were placed before the Court of Appeals through the Government's appeal in its case.

4. On that appeal, the present respondents submitted an *amicus* brief, and the banking group, including petitioner, were permitted to answer it in a reply brief (Pet. B-19).

5. On the same appeal, the banking group defendants, including petitioner, acquiesced in the quoted finding of the District Court (Pet. C-22).

REASONS FOR DENYING THE WRITS

I

The proceedings in the Court of Appeals were free of prejudicial error.

Petitioner contends that the Court of Appeals did not have before it a record sufficient to support its judgment (Pet. 4-5, 11). We disagree.

The Court of Appeals had before it the affidavits on the motion to dismiss our appeal, which adequately described the complaint. The Court was also entitled to take judicial notice of the record in the companion case brought up by the Government; *Smith* v. *Hall*, 301 U. S. 216, 218-9 (1937); *West Ohio Gas Co.* v. *Public Utilities Com.*, 294 U. S. 63, 70-71 (1935). That record embraced the District Court's decision as well as all the evidence bearing on the sole issue herein, *i.e.*, the invalidity of the put contract under § 20a of the Interstate Commerce Act, 49 U.S.C. § 20a. To require, on top of these data, the filing of our record would merely have duplicated the Government's record, which was already before the Court, and would have been the height of futile formalism.

But even if, *arguendo*, the procedure of the Court below were deemed irregular, petitioner does not allege, let alone show, that it was prejudiced. Petitioner does not claim that, upon the filing of our record in the Court below, it could have offered any new argument not previously advanced in the Government's case. Indeed, had any new argument been available on the strength of our record, petitioner would doubtless have called it to the attention of the

Court below through a motion for reargument. If this Court were now to vacate the decision below in order to permit the formal filing of our record, the Court of Appeals would, after obeying this Court's mandate, have to re-enter its previous decision; and the parties would ultimately find themselves in exactly the same position as today, with nothing achieved but loss of time and a good deal of expense. Writs of certiorari and mandamus are not issued for such idle exercise in procedural technicalities. See 28 U.S.C. § 2111.

Petitioner cites *Stern and Grossman, Supreme Court Practice* (2d Ed., 1954), p. 13, as indicating that the failure to file our record in the Court below may deprive this Court of jurisdiction. However, *Gay* v. *Ruff*, 292 U. S. 25, 30 (1934), holds that "the sole essential of this Court's jurisdiction to review is that there be a case pending in the circuit court of appeals." That our appeal was so pending is undisputed.

Illusory also are the difficulties which petitioner envisages from Supreme Court Rule 26(1). The Rule requires the printing of those portions of the record below "necessary for a consideration of the questions presented". The record in the Government's case, which was before the Court of Appeals, is now before this Court in No. 741. No more than that is necessary for this Court's consideration of the questions presented.

II

The Court below properly held the District Court's decision appealable under 28 U.S.C. § 1292(a)(1). That ruling is in accord with the controlling decision of this Court; and it is not in conflict with any decision of any other Court of Appeals.

The Court below held that we were entitled to appeal from the District Court's order as from an interlocutory refusal of an injunction, 28 U.S.C. § 1292(a)(1). Petitioner would find this ruling in conflict with decisions of the Third and Seventh Circuits (Pet. 12, 14-15); and Judge Clark's dissenting opinion cites a medley of additional cases supposedly indicating an "acute condition" of "confusion" regarding the scope of § 1292 (Pet. E-1112 - E-1114).

If the authorities so adduced were as pertinent to this case as they are numerous, the present petition might well offer an opportunity to clarify the alleged contradictions. But actually the differences existing among the Circuits are wholly irrelevant to the case at bar; and the cloud of citations merely obscures their complete lack of pertinence. Whether one adopts the views of the Second, the Third, the Seventh or any other Circuit, the case at bar, as we shall show, falls squarely within § 1292.

As applied to the present facts, § 1292 permits "appeals from • • • Interlocutory orders of district courts • • • refusing • • • injunctions." The first of these statutory conditions, the presence of an interlocutory district court order, was found by the Court below; the dissenting Judges agreed; petitioner agrees (Pet. 12); and we shall, *arguendo*, likewise agree for purposes of this petition.

The remaining questions then are whether what we sought was an "injunction"; and whether the District Court "refused" it. In reading the authorities cited by Judge Clark and by petitioner, it is necessary to bear in mind whether they relate to the first or the second of these questions.

1. Respondents sought an "injunction" within § 1292.

Although, as a rule, one knows a prayer for injunction if one sees it, attempts have been made to broaden the concept of the term "injunction" beyond its conventional meaning. Thus injunctive character has been claimed for demands for a jury trial, applications for a stay, and motions to disqualify an attorney. Many of the authorities cited by petitioner and by Judge Clark have dealt with contentions of this kind.

Thus, *City of Morgantown* v. *Royal Insurance Co., Ltd.*, 337 U. S. 254 (1949), held that an order striking a demand for jury trial was not appealable as the refusal of an "injunction."

Baltimore Contractors, Inc. v. *Bodinger*, 348 U. S. 176 (1955), *Armstrong-Norwalk Rubber Corp.* v. *Local Union No. 283*, 269 F. 2d 618 (Cir. 2, 1959), and *John Thompson Beacon Windows, Ltd.* v. *Ferro, Inc.*, 232 F. 2d 366, 369 (Cir. D. C., 1956), held that an order granting or denying a stay of an equity action pending arbitration did not involve the grant or refusal of "injunctive" relief. See also *Greenstein* v. *National Skirt & Sportswear Ass'n*, 274 F. 2d 430 (Cir. 2, 1960).

American Airlines v. *Forman*, 204 F. 2d 230 (Cir. 3, 1953), held that the denial of a motion to dismiss for lack of jurisdiction the complaint in an ordinary damage action was not appealable as the denial of an "injunction".

Finally, *Marco* v. *Dulles*, 268 F. 2d 192 (Cir. 2, 1959), and *Fleischer* v. *Phillips*, 264 F. 2d 515 (Cir. 2, 1959), cert. den. *Fleischer* v. *Benjamin*, 359 U. S. 1002, held that an order refusing to disqualify the attorney for another party was not the denial of an "injunction."

Plainly all these cases are wholly inapposite to that at bar. It is undisputed that the sixth count of our complaint and our motion for judgment thereon did seek a genuine injunction in the conventional sense. The foregoing authorities, which merely refused to extend the term "injunction" to marginal and extraordinary situations, are, therefore, beside the point.

We turn to the question whether the District Court "refused" an injunction. Its decision was twofold: (a) It granted summary judgment dismissing the sixth count of the complaint; and (b) it denied our motion for summary judgment on that count. In either aspect, we submit, the decision constituted the interlocutory "refusal" of an injunction within § 1292.

2. The grant of summary judgment dismissing the sixth count was the "refusal" of an injunction under § 1292.

A long and unbroken line of authorities holds that the interlocutory dismissal of a claim for injunctive relief is appealable under § 1292, even though other aspects of the claim or related claims or counterclaims remain pending in the District Court.

General Electric Co. v. *Marvel Rare Metals Co.*, 287 U. S. 430 (1932);
George P. Converse & Co., Inc. v. *Polaroid Corporation*, 242 F. 2d 116 (Cir. 1, 1957);
Telechron, Inc. v. *Parissi*, 197 F. 2d 757 (Cir. 2, 1952);
Cutting Room Appliances Corp. v. *Empire Cutting M. Co., Inc.*, 186 F. 2d 997 (Cir. 2, 1951);
Simmonds Aerocessories, Limited v. *Elastic Stop Nut Corporation of America*, 257 F. 2d 485, 489 (Cir. 3, 1958);
Hook v. *Hook & Ackerman, Inc.*, 233 F. 2d 180, 182 (Cir. 3, 1956), cert. den. 352 U. S. 960.

The rule of these cases applies squarely to the case at bar. Under that rule, the dismissal of the sixth count was the refusal of an injunction. The continued pendency in the District Court of claims attacking the put contract on other grounds prevented the dismissal of the sixth count from being a "final decision"; it did not prevent that dismissal from being an interlocutory order appealable under § 1292.

Petitioner contends that this conclusion is in conflict with decisions from the Third and Seventh Circuits (Pet. 14-15); but there is no such conflict.

(a) The Third Circuit cases.

Petitioner invokes (Pet. 14) the following Third Circuit cases: *Morgenstern Chemical Co., Inc.* v. *Schering Corporation*, 181 F. 2d 160 (Cir. 3, 1950); *Albert* v. *School District*, 181 F. 2d 690 (Cir. 3, 1950); *Hook* v. *Hook & Ackerman, Inc.*, 213 F. 2d 122 (Cir. 3, 1954). They are inapposite since none of them involved the dismissal of a claim for injunctive relief. In later decisions, however—ignored by

petitioner as well as by Judge Clark—the Third Circuit squarely held that the interlocutory dismissal of a claim for an injunction does constitute the refusal of an injunction within § 1292; *Simmonds Aerocessories, supra* (257 F. 2d, at 489); *Hook, supra* (233 F. 2d, at 182). Thus the pretended conflict between the decision below and those of the Third Circuit is non-existent.

The Third Circuit did hold that the *denial* of summary judgment for an injunction because of the presence of fact issues is not appealable, inasmuch as such denial does not have "a final and irreparable effect on the rights of the parties" (*Morgenstern*, 181 F. 2d, at 162). But in the present case the District Court *granted* summary judgment dismissing our injunction claim. The Second and Third Circuits are in complete agreement that such an interlocutory *grant* of summary judgment is appealable under § 1292.

(b) The Seventh Circuit case.

Petitioner cites (Pet. 12, 15) *Packard Motor Car Co.* v. *Gem Mfg. Co.*, 187 F. 2d 65 (Cir. 7, 1950), cert. granted 341 U. S. 930, dism. by stip. 342 U. S. 802, as being in conflict with the decision below. *Packard* was a suit for patent infringement and unfair competition; the defendant counterclaimed for declaratory relief and for an injunction based on alleged anti-trust violations. The District Court dismissed so much of the counterclaim as related to the anti-trust violations. Upon the defendant's appeal, the Seventh Circuit conceded that, prior to the adoption of Rule 54(b) F.R.C.P., the decision would have been appealable as an interlocutory refusal of an injunction under § 1292; but it dismissed the appeal because of the defendant's failure to obtain from the District Court a determi-

nation under Rule 54(b). We need not stop to consider whether the court was right in requiring such a determination for an interlocutory appeal*; for in the case at bar the District Court did make the determination under Rule 54(b) (Pet. A-10). It follows that our appeal was properly taken, whether the *Packard* doctrine be accepted or rejected. The differences between the Seventh and the other Circuits concerning the *Packard* doctrine are, therefore, immaterial to the case at bar.

(c) Other Circuit cases.

Petitioner and the dissenting Judges below round out their arguments by the indiscriminate citation of cases which have simply nothing to do with § 1292.

In *Schwartz* v. *Eaton*, 264 F. 2d 195 (Cir. 2, 1959); *John & Sal's A. S. Inc.* v. *Jones Beach S. P. A.*, 267 F. 2d 862 (Cir. 2, 1959); *Goldlawr, Inc.* v. *Heiman*, 273 F. 2d 729 (Cir. 2, 1959); *Gauvreau* v. *United States Pictures, Inc.*, 267 F. 2d 861 (Cir. 2, 1959); *Cott Beverage Corp.* v. *Canada Dry Ginger Ale*, 243 F. 2d 795 (Cir. 2, 1957); and *Brandt* v. *Renfield Importers, Ltd.*, 269 F. 2d 14 (Cir. 8, 1959), the appellants sought to sustain appealability as from a final judgment under 28 U.S.C. § 1291; as the Court below pointed out (Pet. B-19), neither the briefs nor the opinions in those cases discussed appealability as from the denial of an injunction under § 1292. The cases thus do not touch on the issue here involved.

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* The other Circuits have expressly rejected *Packard's* requirement of such a determination in case of interlocutory appeals. *George P. Converse, supra* (Cir. 1, 242 F. 2d, at 119); *Meyer* v. *Indian Hill Farm, Inc.*, 258 F. 2d 287, 290 (Cir. 2, 1958); *Hook, supra* (Cir. 3, 233 F. 2d, at 182; cert. den. 352 U. S. 960); *Pang-Tsu Mow* v. *Republic of China*, 201 F. 2d 195, 197-8 (Cir. D. C., 1952), cert. den. 345 U. S. 925.

Spruill v. *Cage*, 262 F. 2d 355 (Cir. 6, 1958), and *Wallace Products, Inc.* v. *Falco Products*, 242 F. 2d 958 (Cir. 3, 1957), involved not even a pretended claim for an injunction; neither case mentions § 1292. And, similarly, the claim dismissed in *District 65* v. *McKague*, 216 F. 2d 153 (Cir. 3, 1954), did not purport to seek injunctive relief and was, therefore, beyond the scope of § 1292.

We submit, therefore, that the District Court's summary dismissal of our sixth count was appealable under § 1292; and in so holding, the decision below is in accord with *all* the authorities, including those from this Court and from the Third and Seventh Circuits.

3. The denial of respondents' motion for summary judgment on the sixth count was likewise the "refusal" of an injunction under § 1292.

Since the *dismissal* of the sixth count gave us a clear right of appeal under § 1292, it is not too important whether the *denial of our motion for summary judgment* gave us the same right. Out of precaution, we briefly show that it did.

The Second, Fifth and Ninth Circuits hold that the denial of summary judgment for an injunction is appealable under § 1292, no matter whether the motion is denied as a matter of law or because of the presence of issues of fact.

Raylite Electric Corp. v. *Noma Electric Corp.*, 170 F. 2d 914, 915 (Cir. 2, 1948);

Federal Glass Co. v. *Loshin*, 217 F. 2d 936 (Cir. 2, 1954); 224 F. 2d 100 (Cir. 2, 1955);

International Forwarding Co. v. *Brewer*, 181 F. 2d 49 (Cir. 5, 1950);

Talon, Inc. v. *Union Slide Fasteners, Inc.*, 249 F. 2d 308 (Cir. 9, 1957).

On the other hand, the Third Circuit and the District of Columbia draw a distinction: If summary judgment for an injunction is denied because of the presence of fact issues, the order is not appealable; but if summary judgment is denied as a matter of law, the unsuccessful applicant may appeal under § 1292. Professor Moore favors this view.

Morgenstern, supra (Cir. 3, 181 F. 2d 160);
Hook, supra (Cir. 3, 213 F. 2d 122, 128);
Division 689 v. *Capital Transit Company*, 227 F. 2d 19 (Cir. D. C., 1955);
6 *Moore's Fed. Pr.* (2d ed., 1953), § 54.07, p. 51; § 56.21 (2), pp. 2321-2;
Comment, 7 Stanford L. Rev. 549, 554-5 (1955).

The rationale for this distinction is discussed in the footnote.*

The present case offers no opportunity for choosing between these conflicting views. For here the District Court expressly negated the presence of any issue of fact (Pet. A-2); it denied our motion for summary judgment as a matter of law. In consequence, its decision was appealable,

* *Morgenstern* held that the denial of summary judgment on account of the presence of fact issues is not appealable because the effect of such a decision "is merely to require the submission of additional evidence" and is "not greatly different from an order continuing a cause already calendared for trial until some future date in order that additional witnesses may be called" (181 F. 2d. at 162). This rationale, of course, does not fit an order denying summary judgment as a matter of law; for no amount of additional evidence can cure a claim which lacks legal foundation.

In *Division 689, supra*, the court's majority dismissed the appeal only because the denial of summary judgment reflected "no more than a ruling that a genuine issue of material fact remains to be tried" (227 F. 2d. at 20). Judge Danaher, while accepting the *Morgenstern* doctrine, dissented because he read the District Court's decision as ruling "that the plaintiff was not entitled to prevail as a matter of law" (227 F. 2d, at 21).

no matter whether one adopts the doctrine of *Raylite* and *Loshin* or that of *Morgenstern, Hook* and *Division 689*. On either theory, the decision below was correct. This Court will not grant certiorari to resolve a question which is not presented by the facts of this case.

4. The continued pendency in the District Court of related aspects of the claim does not prevent an appeal under § 1292.

The dissenting Judges below advanced yet another argument against appealability: Our complaint attacks the put contract for violating not only the Interstate Commerce Act (count 6), but also the Investment Company Act (count 5) and the New Haven's charter (count 7). The three counts allege but a single claim; and the continued pendency of that claim in the District Court is said to prevent appealability.

The argument is unsupported by any authority; and it is contrary at least to the Third Circuit's decision in *Simmonds Aerocessories, supra* (257 F. 2d, at 489).*

We may assume that counts 5, 6 and 7 allege a single claim which continued pending in the District Court after its decision. If it were otherwise, the dismissal of count 6 would have been a "final decision" appealable under § 1291 and Rule 54(b). The fact that the claim was "single" rendered the dismissal of count 6 "interlocutory." For that

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* In *Simmonds Aerocessories*, one count of the complaint sought an injunction; the other, based on the same facts, sought damages. The plaintiffs' appeal from the dismissal of the first count was sustained under both § 1291 and § 1292 (257 F. 2d, at 489):

> "Moreover, since the first count sought an injunction which was denied by its dismissal, the judgment would be appealable even if it were merely interlocutory. 28 U. S. C. § 1292(1)."

very reason § 1292 became applicable. It is the essence of an interlocutory decision that it does not dispose of the claim as such. The dissenting Judges would hold that the same ground which made § 1292 applicable prevented its application.

The possible renewal of our motion for an injunction on some fact basis other than the lack of ICC approval does not, as the dissenting judges stated (Pet. B-22, E-1114), militate against the present appeal. Since an interlocutory order is, by definition, not final, *any* interlocutory application, although initially unsuccessful, can be repeated and re-repeated on a stronger or different showing of facts; and each decision thereon, if it is the grant or denial of an injunction, can be appealed under § 1292. The possibility of a "plethora" of interlocutory appeals is, therefore, always present. If that be deemed a drawback, the Congress accepted it in enacting § 1292, and this policy binds the Courts.

The Court below, we submit, followed established precedents and policy in entertaining the appeal. Its ruling affords no ground for the grant of certiorari.

III

The decision below on the merits is sound and in accord with administrative practice. The facts of the case are too unique to warrant review by this Court.

1. The case is too unique to warrant review by this Court.

During the 38 years § 20a of the Interstate Commerce Act has been on the books, no case even remotely comparable to that at bar has come before the Commission or the courts; and as many years may go by before anything

similar may recur. The Court below held the case to be "one of first impression" (Pet. C-8); and petitioner concedes that the decisions below are the first to construe § 20a(2) with reference to the questions here raised (Pet. 17). The issues may be of importance to the parties; but the very uniqueness of the facts strips the case of that general interest which might justify review by this Court.

2. The alleged "banking nature" of the transaction is contrary to fact and, in any event, irrelevant to the application of § 20a(2).

The New Haven's contract with the banking group, as amended on April 17/18, 1956 (Gov. App. 23a-27a),* gave the banking group an option or "put" to sell 131,385 shares of the New Haven's preferred stock to the New Haven at $75 per share, a price $15 in excess of the banking group's cost; the put was exercisable 3½ years later, *i.e.*, between November 18 and December 18, *1959*. The New Haven's option or "call" to buy the shares from the banking group at the same price was exercisable within eight months, *i.e.*, between November 18 and December 18, *1956*.** After December 18, 1956, the banking group was free to sell the shares as it liked, without being accountable to the New Haven (Gov. App. 24a).

Petitioner calls this a "banking transaction", guaranteeing to the banking group a reasonable but limited "banking

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* The Appendix filed by the Government with the Court of Appeals is referred to as "Gov. App.". It is before this Court in No. 741.

** The call was practically meaningless since the New Haven, having just borrowed $16,000,000 from the Government for the repair of flood damages (Pet. C-3, C-5), was in no position to spend almost $10,000,000 within the next eight months for the purchase of its own shares.

profit", secured by the shares as "collateral" (Pet. 6, 18). It was, of course, nothing of the kind. To be sure, the group was guaranteed a minimum profit of $15 a share. But if the New Haven failed to exercise its call on or before December 18, 1956 and the market price of the stock thereafter rose above 75, the group could sell the shares at the higher price and keep the entire profit. Its chance of profit was thus unlimited; and it held the shares not as "collateral", but as owner.

Whether such an extraordinary deal may be called a "banking transaction" is irrelevant to the application of § 20a(2). The scope of the statute is defined by its terms; it allows no exemption for "banking transactions". It is undisputed that the issuance of negotiable instruments by a carrier falls within § 20a(2); *Lehigh Valley R.R. Conditional Sales Contract*, 233 I.C.C. 359, 365; see Pet. 20-21. Such issuance might often be part of a "banking transaction"; but the use of that label cannot defeat the application of the statute.

3. Petitioner wrongly ascribes to the Court below the use of an "economic test" for the application of § 20a(2).

Petitioner's main argument is that the Court below determined the applicability of § 20a(2) by the "hindsight and chancellor's foot test" of the "economic effect" which the agreement produced four years after it was made (Pet. 18-21). It is the use of this "unworkable test" which supposedly causes "widespread concern to banks, financial institutions and others" (Pet. 17).

It is petitioner who has fabricated the obnoxious test which it would impute to the Court of Appeals. The actual

basis of the decision below, in briefest summary, was this: § 20a(2) makes it "unlawful for any carrier to issue any share of capital stock * * * unless and until * * * the Commission by order authorizes such issue". The preferred shares of the New Haven were, of course, "shares of capital stock". Under settled ICC practice, an amendment of the terms of such shares is just as much an "issue" thereof within § 20a(2) as is the original issuance of stock (Pet. C-9, footnotes 4, 5, 6); under the same practice, it makes no difference that the amendment here, which gave the contracting stockholders the right to have their shares redeemed at a fixed price, was contained in a separate agreement rather than being stamped on the stock certificates (Pet. C-12, footnote 9). The Court's conclusion that the put agreement fell within § 20a(2) was thus predicated upon careful analysis of the language of the statute in the light of its "remedial purposes" evidenced by the legislative history (Pet. C-11),* and upon a painstaking review of the Commission's administrative practice.

Only after reaching its conclusion by these traditional methods of statutory interpretation did the Court point out that the result, far from being the product of dogmatic legalism, was in accord with the "highly practical tests of the marketplace"; under these tests, an agreement capable of producing an "economic effect" as far-reaching as that of the put contract here involved will indeed be viewed as modifying the shares of stock affected (Pet. C-11).

It was certainly legitimate for the Court to fortify its legal conclusions by showing that they were in harmony

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*For the legislative history of § 20a, see also *New York C. & St. L. R. Co. v. Frank*, 314 U. S. 360, 387 (1941, diss. op.).

with a practical business view. But to ascribe to the Court, as does petitioner, a test of statutory invalidity which would turn on the "economic effect" of the transaction is a gross perversion of the decision below.

4. The decision below is in accord with the ICC's practice in administering § 20a(2).

Petitioner would read the decision below as "riding roughshod over the ICC's 40 years of settled construction of § 20a(2)" (Pet. 17). To substantiate this charge, petitioner points to the ICC's practice of accepting or declining jurisdiction under § 20a(2) "regardless of the transactions' financial significance" (Pet. 19). But as we have shown, the Court below never adopted the preposterous test of "economic effect" and "financial significance" which petitioner would read into its opinion. The pretended conflict between the Court's decision and the ICC's practice is, therefore, imaginary.

The Court below, as we have said, took pains to conform its decision to the ICC's practice. It gave explicit attention to most of the ICC cases now cited by petitioner (Pet. 19-20). The gist of those cases is that § 20a(2) applies only to "instruments negotiable or quasi-negotiable in character, such as are issued for the purpose of railroad financing"; *Lehigh Valley R.R. Conditional Sales Contract*, 233 I.C.C. 359, 365 (1939); see Pet. 21. Since conditional sales contracts,* open book indebtedness,** mort-

* See *Lehigh Valley R.R. Conditional Sales Contract*, 233 I.C.C. 359 (1939); *Application of Louisiana Ry. & Navigation Co.*, 67 I.C.C. 808 (1921).

** *Minneapolis & St. L. R.R. Reorganication*, 244 I.C.C. 357, 366 (1941).

gages,* loans not evidenced by notes or bonds,** etc., are not "instruments negotiable or quasi-negotiable in character", the ICC properly held that they are not "evidences of indebtedness" within § 20a(2); and the Court below agreed (Pet. C-13). By contrast, however, the New Haven shares, which were the subject of the put contract, were unquestionably negotiable or quasi-negotiable instruments. To be sure, the put contract itself was not a negotiable instrument; but it amended the terms of the preferred shares which were negotiable; and that, as we have shown (*supra*, p. 17), is enough for the application of § 20a(2).

5. The ICC's procedural delay affords petitioner no defense in this action.

Petitioner finally states that officers of the New Haven secured informal "clearance" of the put contract from two officials of the ICC, and that the ICC thereafter remained inactive for three years. Petitioner urges this Court to review the question of the extent to which it could rely on these matters (Pet. 22-23).

In the lower courts petitioner expressly disclaimed any contention that these facts resulted in "authorization" of the put contract by the ICC, or that they estopped the ICC from challenging the agreement as illegal (Pet. A-7). Petitioner merely argued that the ICC's failure to take action for three years constituted a practical construction by it

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* *Missouri Southern R.R. Bonds*, 230 I.C.C. 49 (1938); *Illinois Terminal R.R.*, 221 I.C.C. 676, 679 (1937).

** *Davidson Transfer & Storage Co. First Mortgage*, 282 I.C.C. 521 (1952).

of § 20a(2), which a court should not disregard (*ibid.*). This Court has already given the answer: "The failure of the Commission to act is not a binding administrative interpretation"; *United States* v. *DuPont*, 353 U. S. 586, 590 (1957); *Baltimore & O. R. Company* v. *Jackson*, 353 U. S. 325, 330-1 (1957); see Pet. C-15 - C-17.

Petitioner's alleged reliance on "clearance" of the contract with ICC officials is contrary to the record. The original put contract was made on November 10, 1955 (Pet. 6). Although ICC approval, if required, had to be given *in advance* (§ 20a(11)),* the conference at which the New Haven officers reported the contract to two ICC officials did not take place until November 29, 1955 (Pet. A-5). No representative of the banking group attended the conference; and the two ICC officials by no means indicated that they considered ICC approval unnecessary (Pet. A-5 - A-6; Gov. App. 81a-84a). There was thus neither "clearance" by any ICC official nor "reliance" by petitioner or any other member of the banking group.

Finally, it is not true that petitioner remained unaware of the invalidity of the put contract for three years. The invalidity was asserted as early as August 6, 1956 when Dorothy Henessy, one of the plaintiffs herein, filed her complaint in this action; that complaint (par. 16) expressly alleged that the put contract was unlawful for lack of ICC

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*The full text of § 20a(11) appears in Pet. D-2. It provides, in pertinent part:

"Any security issued or any obligation or liability assumed by a carrier, for which under the provisions of this section the authorization of the Commission is required, shall be void, if issued or assumed without such authorization therefor having first been obtained, * * *."

approval.* Petitioner thus received warning less than four months after the date of the amended put contract and had ample time to protect itself if it so desired.

CONCLUSION

It is respectfully submitted that the applications for a writ of certiorari or a writ of mandamus should be denied.

Respectfully submitted,

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April 12, 1960.

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* The District Court's statement that the charge of illegality under the Interstate Commerce Act was first made by the amended complaint filed on June 11, 1957 (Pet. A-7) is "clearly erroneous." Rule 52(a), since it overlooks the Henessy complaint.